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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-1088

LIFE OF THE LAND, et al.,
Petitioners,

vs.

CLAUDE S. BRINEGAR, Secretary of Transportation, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI
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The petitioners, Life of the Land, Hawaii Audubon Society, Friends of the Earth, Raymond Catania, J. Abraham Pasadaba, Wilfred H. Paul, Jr., and Pete Kaululaau G. Thompson, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for

the Ninth Circuit entered in this proceeding on September 10, 1973, rehearing denied, October 16, 1973.[1]

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals, (hereinafter "Opinion"), not yet officially reported, appears at 5 E.R.C. 1780, 3 E.L.R. 20811,[2] and as Appendix A. That court's Order denying the Petition for Rehearing appears as Appendix B. The Decision and Order of the United States District Court for the District of Hawaii, dated December 22, 1972, is reported at 363 F.Supp. 1171 (D.Haw. 1972) and appears as Appendix C. The Final Decision and Order of that court, dated April 13, 1973, incorporating by reference the reasoning set forth in the December 22, 1972 Decision and Order, appears as Appendix D.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered on September 10, 1973. A timely petition for rehearing *en banc* was denied by

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[1]Respondents are Claude S. Brinegar, Secretary of the United States Department of Transportation; John Shaffer, Administrator, Federal Aviation Administration (FAA), National Office; Jack Webb, Administrator, FAA, Pacific Region; E. Alvey Wright, Director, Hawaii Department of Transportation; Kalihi Palama Community Council; James Y. Muraoka; Takeshi Uyesugi; and Dillingham Corporation.

[2]"E.R.C." citations refer to Environment Reporter Cases, published by the Bureau of National Affairs; "E.L.R." citations refer to Environmental Law Reporter, published by the Environmental Law Institute.

that court on October 16, 1973. This petition for certiorari was filed within 90 days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is the standard of judicial review under the National Environmental Policy Act (NEPA) of a threshold agency decision to omit from an environmental impact statement any mention of certain environmental impacts of and alternatives to the proposed project, whether that decision was arbitrary and capricious, with the burden of proof upon plaintiffs, or whether that decision was reasonable, with the burden of proof upon the agency?

2. Is an environmental impact statement for an airport expansion project that fails to mention reasonable non-construction alternatives to the project adequate under the National Environmental Policy Act (NEPA) and under the Airport and Airways Development Act of 1970 (AADA)?

3. Does NEPA permit the preparation of an environmental impact statement to be delegated to a private party with a major and direct financial interest in the proposed project which is the subject of that impact statement?

STATUTORY PROVISIONS INVOLVED

A. *National Environmental Policy Act of 1969 (NEPA)* United States Code, Title 42:

§4321. *Purpose.*
(Text set forth in Appendix E)

§4331. *Congressional declaration of policy.*
(Text set forth in Appendix E)

§4332. *Administration consistent with policies of Act.*
(Text set forth in Appendix E)

B. *Airport and Airways Development Act of 1970 (AADA)* United States Code, Title 49:

§1716. *Submission and approval of projects for airport development.*
(Text set forth in Appendix E)

STATEMENT OF THE CASE

This is an environmental law case involving the adequacy of the Environmental Impact Statement (hereinafter "EIS") for the Reef Runway project at Honolulu International Airport, Honolulu, Hawaii, and the appropriate standard of judicial review thereof, under the provisions both of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§4321 et seq., and the Airport and Airways Development Act of 1970 (AADA), 49 U.S.C. §§1701 et seq. The case presents issues of nation-wide importance concerning which the circuits are in conflict, and upon which this Court has never ruled.

Petitioners, the Plaintiffs and Appellants below, are three environmental organizations and four individual residents of Kalihi-Palama, the area most affected by flight patterns of aircraft arriving and departing from Honolulu International Airport (hereinafter "HIA"). Respondents are those agencies and employees of the Federal and State governments responsible for construction of the Reef Runway. Additional Respondents, allowed by the District Court to intervene over the objection of Petitioners, see Decision and Order of the District Court, 363 F.Supp. 1176, footnote 19, Appendix C, p. 42, are the private company awarded the construction contract for the project, and other Kalihi-Palama residents who favor the runway.

Petitioners filed suit challenging the EIS for the Reef Runway project in the United States District Court for the District of Hawaii on November 8, 1972. Jurisdiction of that court was based upon 5 U.S.C. §701-6 (Administrative Procedure Act); 28 U.S.C. §1331 (Federal Question); 28 U.S.C. §1337 (Regulation of Interstate Commerce); and 28 U.S.C. §1361 (Mandamus). Record p. 3.

The Complaint alleged, *inter alia,* that Respondents had not complied with the requirements of Section 102(2)(C) of NEPA, 42 U.S.C. §4332(2)(C), because the Reef Runway EIS failed to discuss or even mention certain reasonable alternatives to the proposed runway, Rec. 11-13; that Respondents had not satisfied the requirements of Section 16(c)(4) of AADA, 49 U.S.C. §1716(c)(4), because they had not

established that no feasible and prudent alternative to the Reef Runway existed, Rec. 14-15; and that Respondents had violated NEPA's requirement that the "responsible [federal] official" prepare the EIS by delegating preparation thereof to a private consultant with a financial interest in construction of the proposed Reef Runway. Rec. 13-14.

The Reef Runway would be a new 12,000 foot jet runway at HIA, 6,700 feet seaward of and parallel to the existing primary runway, that would nearly double the capacity of HIA. The runway would cost more than $70,000,000.00 and is scheduled to be completed by 1975. It would be built off-shore and would consume some 1,240 acres of ocean coral reef, 765 acres of which would be paved over. EIS, (D-1 in evidence below) pp. 11, 12, 38.

Approximately 186 acres of silted coral mudflats used for roosting and nesting by birds, including the Hawaiian Stilt, an endangered species of bird unique to the Hawaiian Islands, would be destroyed. EIS, p. 26.

The Reef Runway would affect water quality in the surrounding ocean, although whether that effect would be beneficial or adverse is in dispute. See: EIS, pp. 18, 31-2; D-6 ("Plan to Enhance Water Quality in Keehi Lagoon") (beneficial impact); D-16, Appendix 3 ("Study Report—Proposed Reef Runway—Honolulu International Airport"), p. 5; D-18 ("Hydraulic Model Study, Proposed Reef Runway, Honolulu International Airport"), §4, p. 43; Tr. 241-6; 319, 320; P-28 through P-33, and P-39 (adverse impact).

Similarly, the Runway would have an impact both upon air quality and population levels within the state, although again the nature of those impacts is disputed.[3] See Tr. 574-6; 686; 766-7 (air quality: negligible or even beneficial impact); Tr. 134-5; 152, 161-3; 188; 199-200 (air quality: adverse impact); Tr. 767-8; 783-4; 804-5; 807 (demographic impact: negligible); Tr. 24, 27, 29-34, 38-40, 46, 56, 57-8, 65-6, 67, 69, 75 (demographic impact: adverse).

The Reef Runway EIS, dated January, 1972, is the document prepared by Respondents to satisfy the provisions of AADA, and particularly 49 U.S.C. §1716(c)(4), as well as those of NEPA: Tr. 758; 789-90; Opinion, App. A, p. 29. It consists of a total of 46 pages, plus appendages, including a one-and-three-quarter page discussion of four alternatives to the proposed Reef Runway: (1) a new on-shore runway oriented in a 100°-280° direction; (2) a new on-shore runway parallel to existing runway 08-26; (3) a 4,000 foot westward extension of existing runway 08-26 plus an additional new on-shore 6,500 foot reliever runway parallel thereto; and (4) foregoing construction of the Reef Runway altogether. EIS, pp. 34-5.

The purposes of the Reef Runway, as set forth in the EIS, are (1) to increase the capacity of HIA; (2) to reduce the level of aircraft noise over adja-

[3]The EIS does not discuss or even mention the impact of the project upon either air quality in terms of invisible air pollution, or upon population levels and the adverse "secondary" effects that flow from increased population. See Opinion, App. A, pp. 18-21.

cent populated areas by moving present overflights seaward from those areas; (3) to lessen the danger of an aircraft crash into populated areas by the same means; and (4) to increase flexibility at HIA to allow for runway repairs and shut-downs. EIS, pp. 4-5; Opinion, App. A, p. 12.

The chief issue in this litigation has been whether Respondents have complied with the requirements of NEPA and AADA that they discuss in the EIS and consider in their decision-making reasonable alternatives to the Reef Runway which might accomplish these objectives with less environmental harm and at a smaller economic cost.

Petitioners demonstrated at trial that a variety of such reasonable "non-construction" alternatives exist that were not discussed or even mentioned in the EIS. One such alternative, for example, would be to require the two commercial inter-island carriers, Hawaiian Airlines and Aloha Airlines, to commence the takeoff runs of their twin jet DC-9's and Boeing 737's, respectively, from the far western end of the existing primary jet runway, rather than from the present takeoff point, approximately 4,000 feet to the east and closer to the populated areas. At least as to those aircraft, which are as noisy as a Boeing 747, this procedure would immediately eliminate noise and over-flight problems in the Kalihi-Palama Community. Tr. pp. 206-19; 230-1; D-20 (Stanford Research Institute, *Runway Development Requirement at Honolulu International Airport* (1969), at pp. 2, 12, 32).

Other reasonable alternatives not mentioned in the EIS include removing military and general aviation from HIA (thereby reducing the number of operations at HIA by a total of 56%, see Opinion, App. p. 5, and increasing the capacity of HIA by the same percentage), improving air traffic control, employing aircraft with less noisy engines, retrofitting older aircraft with quieter engines, adjusting and consolidating airline schedules so as to increase the passenger load factor on individual flights, and converting the aircraft fleet to wide-body aircraft. See "The Jamaica Bay-Kennedy Airport, A Multi-Disciplinary Environment Study", in evidence as P-4(a) and P-4(b); Tr. 407-13, 423-4, 427-31 (testimony of Prof. Joseph Sax); 815-16 (National Transportation Report).

The Ninth Circuit ruled that the failure of the Reef Runway EIS to mention these alternatives (as well as its failure to include other information such as the impact of the project upon population levels and air quality) did not render it and the decision-making process inadequate under NEPA. The court held that such omissions in an EIS violate that statute only if Petitioners are able to demonstrate that the threshold agency decisions to omit were arbitrary and capricious or an abuse of discretion. Opinion, App. A. pp. 22-4 (non-construction alternatives); pp. 18-9 (demographic impact); pp. 20-1 (air quality impact).

With respect to AADA, the Ninth Circuit held that the EIS should be taken into account in deter-

mining whether the Secretary of Transportation had satisfied the AADA requirement that he determine that no feasible and prudent alternative to the Reef Runway exist before approving the project. Opinion, App. A, p. 29. Relying on its NEPA rulings, the court held that the Secretary had complied with AADA. *Ibid.*

A private engineering firm, the Ralph M. Parsons Company (hereinafter "Parsons"), which, as found by the Ninth Circuit, "had a financial interest in an affirmative decision on the proposed project", Opinion, App. A, p. 13, participated substantially in the preparation of the EIS.

The full extent of Parsons' participation, and of its apparent financial conflict of interest therein, is, however, unclear in the record because the district court judge ruled several times at pretrial and during the course of the trial *as a matter of law* that the preparation of an EIS may be delegated to a private party with a major financial interest in the proposed project. See e.g., Tr. pages 357-8; 363. Consequently, Petitioners were precluded by the trial court from developing the relative degrees of participation by Parsons, the state agency, and the federal agency, although Petitioners' counsel made ample offers of proof on this issue. Tr. 363; 365-6; 368; 369-70; 372; 375-81.

Notwithstanding this, the Ninth Circuit rejected Petitioners' improper delegation claim on the ground that the FAA had participated significantly in the preparation of the EIS. Opinion, App. A, pp. 14, 15.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS WITH RESPECT TO THE PROPER STANDARD OF JUDICIAL REVIEW OF THE THRESHOLD FEDERAL AGENCY DECISION TO OMIT DISCUSSION OR EVEN MENTION IN AN ENVIRONMENTAL IMPACT STATEMENT UNDER NEPA OF CERTAIN ENVIRONMENTAL CONSEQUENCES OF AND ALTERNATIVES TO A PROPOSED PROJECT.

This case involves more than the technical sufficiency of the EIS for the Reef Runway,[4] and indeed more than the fate of the Reef Runway itself. Rather, the opinion below constitutes an emasculating interpretation of NEPA, "the broadest and perhaps most important" of recent federal environmental legislation, *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109, 1111 (D.C.Cir. 1971).

NEPA was intended by Congress to achieve ambitious but vitally important goals. Section 101(a) of NEPA, 42 U.S.C. §4331(a), declares it to be the "continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and to maintain conditions under which man and nature can exist in productive harmony. . . ." NEPA directs, moreover, that "to the fullest extent possible . . . the

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[4]Petitioners do not seek merely a superficial rewriting of the EIS. Petitioners contend, rather, that if the various non-construction alternatives to the project are genuinely considered by the decision makers, the ultimate decision that the Reef Runway is necessary at all may well be reversed. Cf. *Citizens to Preserve Overton Park v. Volpe*, ... F.Supp. ....., ..., 3 E.L.R. 20423, 20423 (W.D.Tenn. 1973) (Secretary of Transportation, upon being compelled to consider alternatives to proposed routing of interstate highway through park following Supreme Court decision in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), reverses prior decision to approve federal funding for such route.)

policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act." 42 U.S.C. §4332(1).

The primary device created by Congress to effectuate this policy is the requirement contained in Section 102(2)(C) of NEPA that prior to undertaking "major Federal actions significantly affecting the quality of the human environment" the "responsible [federal] official" must prepare a "detailed statement" (the so-called "EIS") including discussion of, *inter alia,* "the environmental impact of the proposed action"; "any adverse environmental effects which cannot be avoided should the proposal be implemented"; and "alternatives to the proposed action". 42 U.S.C. §4332(2)(C).

The importance Congress placed upon the section 102(2)(C) requirements as a means of achieving NEPA's goals is emphasized by NEPA's legislative history. In hearings concerning NEPA held at a time when the bills under consideration did not include these requirements, Senator Jackson, NEPA's principal sponsor, responded as follows to a witness who suggested the need therefor:

> I have been concerned with the adequacy of the policy declarations in the bill that I introduced. Obviously, this is not enough. . . .
>
> . . . I agree with you that realistically what is needed in restructuring the governmental side of this problem is to legislatively create those situations that will bring about an action-forcing procedure with which departments must comply.

> Otherwise, these lofty declarations are nothing more than that. It is merely a finding and statement but there is no requirement as to implementation. *Hearings on S.1075, S.237, and S.1752 before the Senate Committee on Interior and Insular Affairs*, 91st Congress, 1st Session 116 (1969).

NEPA was thereupon amended by the Committee to establish the Section 102(2)(C) EIS procedures, which were again characterized as "action-forcing" both in the Committee Report, S. Rep. No. 91-296, 91st Cong., 1st Sess. 9 (1969), and by Senator Jackson on the floor of the Senate during debate on the passage of the bill. 115 Cong. Rec. 40416 (1969).[5]

Once prepared by the responsible federal agency, the EIS is to be circulated to "appropriate federal, state and local agencies" for their review and comment. The EIS, together with any such comments, is then to "be made available to the President, the Council on Environmental Quality and to the public" prior to any final determination on the project. 42 U.S.C. §4332(2)(C).

From this statutory scheme, it is manifest that NEPA is to "serve as an environmental full disclosure law, providing information which Congress thought *the public* should have concerning the particular environmental costs involved in a project," *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973)

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[5]For a detailed summary of the legislative history of NEPA, see Anderson, *NEPA in the Courts: A Legal Analysis of the National Environmental Policy Act* (Environmental Law Institute, 1973), Chapter 1 ("NEPA and Congress"), pp. 1-14.

(emphasis supplied), whose purpose is to compel consideration of environmental factors in the decision-making process, not only by the particular agency involved, but also by the ultimate decision makers: The President, the Congress, and the public. See: *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971); *Natural Resources Defense Counsel v. Morton*, 458 F.2d 827, 835 (D.C. Cir. 1971); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973).

This function was spelled out in a report prepared for the Senate Committee on Interior and Insular Affairs:

> To make policy effective through action, a comprehensive system is required for the assembly and reporting of relevant knowledge; and for placing before the President, the Congress, and the people, for public decision, the alternative courses of action that this knowledge suggests. L. Caldwell, A Special Report to the Senate Comm. on Interior and Insular Affairs, A National Policy for the Environment 11, 90th Cong., 2nd Sess. (Comm. print July 11, 1968). Also at 115 *Cong. Rec.* S. 12129 (daily ed. Oct. 8, 1969).

Because of this fundamental purpose of NEPA and the EIS, the courts should review with especially close scrutiny threshold agency decisions not to prepare an EIS at all or to omit discussion in an EIS of certain environmental impacts of, or alternates to, a proposed project.

The Ninth Circuit, however, has now held that it will apply the Administrative Procedure Act's very

limited "arbitrary and capricious" standard of review, 5 U.S.C. §706(2)(A), to these threshold agency decisions. Moreover, the Ninth Circuit places the burden *upon Petitioners* to demonstrate that such decisions were arbitrary, capricious, or an abuse of discretion. Opinion, App. A, pp. 17-24. For example, the court held that Petitioners had failed to prove that the various non-construction alternatives not mentioned in the EIS, even though "utilized at other airports in the continental United States, are necessarily adaptable to the unique situation existing at HIA." Opinion, App. A, p. 24, fn. 13.

By adopting this very limited standard of review the Ninth Circuit has put itself at odds with at least four other Courts of Appeals that have passed on the standard of review under NEPA of these threshold agency decisions. There are now three different standards of review in the various circuits: (1) That of the Ninth Circuit in this case; (2) That of the Second Circuit in *Hanley v. Kleindienst,* 471 F.2d 823, 829, 836 (2d Cir. 1972), cert. denied, ... U.S. ....., 93 S.Ct. 2290 (1973), and of the Seventh Circuit in *First National Bank v. Richardson,* ..... F.2d ....., 5 E.R.C. 1830, 3 E.L.R. 20771, 20776 (7th Cir. Sept. 13, 1973) (arbitrary and capricious standard is appropriate, but *the agency* has the affirmative duty to develop a reviewable environmental record and to demonstrate that its decision was *not* arbitrary and capricious); and (3) that of the Fifth Circuit in *Save Our Ten Acres v. Kreger,* 472 F.2d 463, 465-7, (5th Cir. 1973), and the Tenth Circuit in *Wyoming Council v. Butz,* ..... F.2d ....., 5 E.R.C. 1844, 1846, 3 E.L.R. 20830, 20831

(10th Cir. Sept. 21, 1973) (arbitrary and capricious standard rejected; appropriate standard is whether the agency's decision was reasonable, with the burden of demonstrating reasonableness upon the agency).[6]

This split among the circuits creates an intolerable situation. Federal agencies with responsibilities affecting the environment now must devise NEPA procedures and evaluate the adequacy of impact statements in terms of three different judicial standards. The matter is complicated by the fact that many agency actions affect the environment in more than one judicial circuit. With impact statements currently being prepared by federal agencies at a rate of more than 1,000 per year, see *Environmental Quality, the Fourth Annual Report of the Council on Environmental Quality* (1973), at 242, establishment of a uniform standard for judicial review is an urgent necessity.

Perhaps the standard set forth in the APA, 5 U.S.C. §706(2)(A), is the correct standard for review of the ultimate substantive agency decision to proceed or not to proceed with the project. See, e.g., *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289, 297-300 (8th Cir. 1972), *cert. denied*, 409 U.S. 1072 (1973); *Sierra Club v. Froehlke*, ... F.2d ....., ..., 5 E.R.C. 1920, 1925 (7th Cir. Oct. 2, 1973). But the

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[6]These cases involve agency decisions whether to prepare an impact statement at all rather than what to include in an impact statement. Clearly, however, both decisions have the same relation to the statutory goals and must be judged by the same standard. Otherwise, an agency could too easily defeat the purposes of NEPA by preparing an EIS that was little more than a hollow shell, omitting crucial information on the impacts of and alternatives to the proposed project.

Ninth Circuit has confused the issue of review of the ultimate substantive decision of the agency with the question of *procedural* compliance by the agency with NEPA, and more particularly of the *adequacy* of the EIS in terms of what information should be included therein. Clearly two different standards of review should apply to these distinct issues. See *Save Our Ten Acres v. Kreger, supra,* at 472 F.2d 467; *Sierra Club v. Froehlke, supra,* at ..... F.2d ....., 5 E.R.C. 1924.

The narrow arbitrary and capricious standard of review under the Administrative Procedure Act is an inappropriate standard of review of procedural compliance since "NEPA's specific requirements in [§4332 (2)(C)] clearly speak in mandatory terms, and do not leave the determination to administrative discretion. [citations omitted]". *Wyoming Council v. Butz,* ..... F.2d ....., 5 E.R.C. 1844, 1846, 3 E.L.R. 20830, 20831 (10th Cir. Sept. 21, 1973). While "some area of judgment is [of course] involved . . . the compass of the judgment to be made is narrow . . .", and the test on review should be that "the determination *must be reasonable* in the light of the mandatory requirements and high standards set by the statute. [Citations omitted.]" *Id.* at ..... F.2d ....., 5 E.L.R. 1847, 3 E.L.R. 20831. *Accord: Save Our Ten Acres v. Kreger,* 472 F.2d 463, 465-7 (5th Cir. 1973).

Moreover, the spirit of the Act demands that the burden of proving compliance therewith fall upon the agency, and not upon citizen plaintiffs, since

> the very nature of this legal area is so extensive that if the burden were placed wholly upon citi-

> zen plaintiffs, the full disclosure requirements of NEPA would never be implemented satisfactorily, and environmental protection as contemplated by Congress would be little more than a fiction.

Sierra Club v. Froehlke, 359 F.Supp. 1289, 1335 (S.D. Tex. 1973). See also *Calvert Cliffs', supra*, at 449 F.2d 1118-9.

The practical effect of the Ninth Circuit's ruling, if left unchallenged is, to render NEPA superfluous and an act of futility by the Congress, because *even before NEPA* an agency's decision to adopt one alternative rather than another was subject to review under the APA standard.

Specifically, the decision below nullifies the two basic purposes of NEPA. First, it permits an agency too easily to exclude from its impact statement and its decision-making process alternatives not compatible with its own narrow conception of its mission, a conception which may be inconsistent with environmental protection. A major purpose of NEPA was to compel agencies to take a broader view.[7]

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[7]That this result actually will occur is apparent from this case, where the Ninth Circuit approved an impact statement for a $70,000,000.00 airport construction project which devotes only one-and-three-fourths pages to alternatives and which mentions no alternatives involving safer and more efficient airport management as opposed to additional construction. By employing its unique standard, the Ninth Circuit was able to justify omission of the alternative of removing Air Force jets by simply noting that "the Air Force had refused to move . . . .". Opinion, App. A. pp. 22-3. But one purpose of the EIS should have been to examine the costs and benefits of the Air Force decision. The

Second, it allows the agency too easily to frustrate the goal of NEPA to bring the public into the decision-making process with regard to environmental matters, and to open the opportunity for the public, with full data available to it in the form of an adequate EIS, to effect changes in substantive decisions made by public agencies, *even though those decisions might not be so wrong as to be characterizable as arbitrary, capricious, or an abuse of discretion.*[8]

Ninth Circuit justified non-discussion of the alternative of higher landing fees on the bootstrap ground that this alternative was considered but rejected by Respondents. *Id.* at 23. The court held that Respondents need not mention the alternatives of moving private aircraft and requiring inter-island jets to take off at different points because each of these measures was only a partial solution. *Ibid.* And, finally, the Ninth Circuit ratified Respondents' failure to mention the alternatives of consolidating airline schedules and converting to wide-body aircraft by stating that nothing in the record indicated these to be reasonable alternatives, *Id.* at 24, and at the same time brushing off the positive experience with these techniques at other airports as being irrelevant. *Id.* at 24, n. 13. If NEPA's requirement that an agency "discuss in detail" the alternatives to a proposed action means no more than this, it might as well not exist.

[8]In the Reef Runway situation, for example, had the public been appraised in the EIS of the full adverse effects upon the State of increased population and air pollution, or of certain alternatives to the project which did not happen to appeal to the agency, or were not within the agency's jurisdiction (such as compelling the military to remove its operations from HIA), the public might very well, through persuasion or intervention via Congress, have overruled the agency decision to proceed, *even though* that decision was not necessarily invalid under the APA test.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE DISTRICT OF COLUMBIA CIRCUIT IN NRDC v. MORTON, 458 F.2d 827 (D.C.CIR. 1972) AND WITH THIS COURT IN CITIZENS TO PRESERVE OVERTON PARK v. VOLPE, 401 U.S. 402 (1971), WITH RESPECT TO THE NEED TO DISCUSS AND CONSIDER ALTERNATIVES TO A PROPOSED AIRPORT EXPANSION PROJECT UNDER NEPA AND AADA, RESPECTIVELY.

A. NEPA.

As previously noted, NEPA requires that the EIS for a major federal action include discussion of the ". . . alternatives to the proposed action". 42 U.S.C. §4332(2)(C)(iii). Further, §4332(2)(D) mandates the federal agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources".

The Ninth Circuit held that Petitioners had not proved that Respondents' failure to mention in the EIS a whole range of non-construction alternatives to the Reef Runway was not arbitrary and capricious or an abuse of discretion. The propriety of this standard of review is discussed in Section I, *supra*. Among the reasons given for this general conclusion are (1) that removing military and general aviation operations from HIA altogether, and compelling the inter-island carriers to commence their take-offs from the far western end of the existing runway, would not, *by and of themselves individually*, totally solve the noise and safety problems at HIA, Opinion, App. A, pp. 22-3, and (2) that certain alternatives, such as, specifically, removing the Air Force KC-135 tanker operations

from HIA to a nearby military airport, were not within the immediate jurisdiction of the state agency: "There is, however, evidence indicating that the Air Force had refused to move its jet tankers to another base, *effectively eliminating implementation of this alternative*" (emphasis supplied), *Ibid.*

The Ninth Circuit's ruling on alternatives under NEPA places it squarely in conflict with the other leading NEPA case on the necessity to discuss alternatives in an EIS, *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 833-6 (D.C.Cir. 1972). *Morton* held both that an agency may not "disregard alternatives merely because they do not offer a complete solution to the problem", *Id.* at 458 F.2d 836, and that an agency may not omit discussion of an alternative in an EIS merely because implementation of that alternative is not within the jurisdiction of the particular agency. *Id.* at 458 F.2d 834.

The policy reasons for this rule are the same as those already noted in Section I, *supra*, to wit, that the EIS is designed not only to force the particular agency involved to consider environmental factors in its decision-making process, but, at least equally important, is *also* "for the guidance of these ultimate decision-makers [Congress, the President, and the public]" *Id.* at 458 F.2d 835.

B. AADA.

The Airport and Airways Development Act of 1970, 49 U.S.C. §§1701 *et seq.*, which authorizes the expenditure of substantial federal funds "in order to bring about, in conformity with the national airport system

plan, the establishment of a nationwide system of public airports adequate to meet the present and future needs of civil aeronautics", 49 U.S.C. §1714(a), also expresses the Congressional intent that such airports be compatible with the surrounding natural environment and not contribute to its degradation. See generally 49 U.S.C. §1716(c)(4), -(d), and -(e).

To this end, Section 16(c)(4) of AADA, 49 U.S.C. §1716(c)(4), imposes even more stringent requirements than does NEPA upon the federal agency to consider alternatives before approving major airport expansion projects:

> . . . The Secretary [of Transportation] . . . shall authorize no such project found to have adverse [environmental] effect unless the Secretary shall render a finding, in writing, following a full and complete review, which shall be a matter of public record, *that no feasible and prudent alternative exists* and that all possible steps have been taken to minimize such adverse effect. (Emphasis supplied.)

The "no feasible and prudent alternative" language of AADA is identical to that of Section 4(f) of the earlier enacted Department of Transportation Act of 1966 concerning approval of highways through parks, 49 U.S.C. §1653(f), [23 U.S.C. §138]. Indeed, the House Report on AADA states: "The responsibility thus vested in the Secretary of Transportation is comparable to that contained in Section 4(f) of . . . the Department of Transportation Act." House Report 90-601, U.S. Code Cong. Adm. News, pp. 3057-8.

This Court interpreted §4(f) in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971). In *Overton Park,* Mr. Justice Marshall, speaking for a unanimous Court (Mr. Justice Douglas took no part in the consideration or decision of the case; Mr. Justices Brennan and Blackmun filed short concurring opinions), stated that

> This language is a plain and explicit bar to the use of federal funds for construction of highways through parks—*only the most unusual situations are exempted.*
>
> . . . .
>
> . . . For this exemption to apply the Secretary *must find that as a matter of sound engineering it would not be feasible to build the highway along any other route. Id.* at 401 U.S. 411. (Emphasis supplied).

Further, this Court stated that

> . . . The very existence of the statutes indicates that protection of parkland was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly *unusual factors present* in a particular case or the cost or community disruption resulting from alternate routes reached *extraordinary magnitudes.* If the statutes are to have any meaning, the Secretary *cannot approve the destruction of parkland unless he finds that alternate routes present unique problems. Id.* at 401 U.S. 412-13. (Emphasis supplied.)

The Court reversed, indicating that it was not clear from the record whether the Secretary had made the requisite findings, and if so, the reasons "why he

believed there were no alternative routes . . ." *Id.* at 401 U.S. 408.

Although not concerned necessarily with parklands in section 16(c)(4) of AADA, Congress must have been equally concerned with the increased noise and air pollution, demographic impact, and safety problems that new airports and airport expansions inevitably bring.[9] Thus, the Secretary "cannot approve" these inevitable adverse environmental impacts unless he finds "as a matter of sound engineering" that alternatives to the proposed airport expansion "would not be feasible", or that they present costs or "community disruption" of "extraordinary magnitude", or otherwise present "unique problems".

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[9]Respondents will argue at this point that the Reef Runway is unique in that its effect would be to *improve* air quality, noise levels, and safety in the populated areas adjacent to HIA by moving aircraft operations 6,700 feet seaward, away from those areas. This argument is necessarily based upon the premise that use of the existing runway will be discontinued upon completion of the Reef Runway. This premise, however, is erroneous. The State Respondents have conceded, for example, that the existing runway will continue to be used by jet aircraft even after the Reef Runway is completed. P-107; Tr. 640. Moreover, the United States Air Force, whose KC-135 tankers are conceded by all parties to be the worst noise and safety offenders at HIA, has consistently refused to commit itself to utilizing the new Reef Runway. Indeed, if the Respondents are unwilling to compel inter-island jets to taxi an additional 4,000 feet to the western end of the existing runway before taking off because of the extra cost this entails, Tr. 215, it is difficult to see why either the Air Force or the commercial overseas carriers would or should take it upon themselves to incur the extra cost and fuel consumption in taxiing nearly *7,000* additional feet out to the Reef Runway. And, in any event, if, as the State and Federal Respondents maintain, the number of operations at HIA will have doubled by the year 1985 (from 250,000 operations in 1971 to an estimated 493,000 operations in 1985), Opinion, App. A, p. 5, it follows that by 1985, *both* the Reef Runway and the existing runway will be employed to full capacity.

The Federal Respondents herein considered the EIS prepared under NEPA as constituting the "public record" of the mandated "full and complete review" of alternatives by the Secretary required by AADA, Tr. 758, 789-90, 829, and added thereto only a one paragraph conclusionary letter dated January 21, 1972 from the FAA Regional Director, that "After careful and thorough consideration of the facts contained herein [i.e., in the EIS], . . . it is the finding of the undersigned . . . that there is no feasible and prudent alternative to the requested action *which has not been considered. . . .*" D-27 in evidence below (emphasis supplied).

The Secretary thus not only misread the requirement of §16(c)(4), he made none of the findings required by *Overton Park*. Moreover, the EIS, as the "public record", contains no mention whatsoever, let alone discussion, of the several alternatives that the record indicates *do* exist, have in fact been employed successfully at other airports, and indeed have been endorsed by the very same Secretary on another occasion as having significance "to the nation as a whole".[10] Indeed, the "public record" of the review proceeding reveals no point at which these alterna-

[10] "The Jamaica Bay-Kennedy Airport, a Multi-Disciplinary Environmental Study", in evidence as P-4(a) and P-4(b). This study, which discussing in detail the use of non-construction alternatives only at Kennedy Airport, was endorsed by then Secretary of Transportation John A. Volpe in a letter attached to it dated March 13, 1970 as having significance "not only to the immediate New York situation, but to the nation as a whole . . . ." P-4(a), page xiii; Tr. 405.

tives were considered and rejected after enactment of Section 16(c)(4).[11]

The Ninth Circuit's cramped interpretation of §16 (c)(4) conflicts in principle with the broad and expansive interpretation emphatically and unanimously given the identical Department of Transportation Act language by this Court in *Overton Park*. The court simply incorporated its previous rulings with respect to alternatives under NEPA, and concluded that the Secretary of Transportation "could have *reasonably believed* that in this case there are no feasible alternatives or that alternatives do involve unique problems", Opinion, App. A, p. 30, quoting from *Overton Park, supra,* at 401 U.S. 416 (emphasis in Opinion, but not in *Overton Park*), and that the Secretary's action was not arbitrary or capricious.

If the decision below is permitted to stand, the goals of §16(c)(4) will be defeated. The Court of Appeals, by stressing the "could have reasonably believed" branch of the *Overton Park* standard and ignoring the equally important requirement that the reasonable belief be based on consideration of "all relevant factors", in effect turned the FAA's omissions in this case into a ground for upholding the agency's action. This standard of review could wreck the statutory scheme by allowing agencies to approve environmentally harmful actions to which feasible

[11]Any rejection of an alternative which occurred prior to enactment of §16(c)(4) in May 1970 could not qualify as a valid ground for the required finding, since it may have been based on an entirely different standard.

and prudent alternatives exist simply by ignoring those alternatives throughout the review process.[12]

A rule that would accord with the statutory purpose of Section 16(c)(4) and with *Overton Park* is that when no evidence appears in the public record that a rejected alternative is not feasible and prudent, and plaintiffs present *prima facie* evidence that it is, the burden then shifts to the defendant official to explain further the reasons for his decision. Only thus can the court be assured that all relevant factors were considered and that the decision was not arbitrary or capricious.

III. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE SECOND CIRCUIT IN GREENE COUNTY PLANNING BOARD v. FPC, 455 F.2d 412 (2nd Cir. 1972), cert. denied, 409 U.S. 849 (1972) AS TO WHETHER THE PREPARATION OF AN EIS MAY BE DELEGATED TO A PRIVATE COMPANY WITH A DIRECT FINANCIAL INTEREST IN AN AFFIRMATIVE DECISION ON THE PROPOSED PROJECT WHICH IS THE SUBJECT OF THE EIS.

NEPA requires that the "detailed statement" be prepared by the "responsible official" of the Federal agency involved. 42 U.S.C. §4332(2)(C).

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[12]The magnitude of planned airport development in the United States underlines the significance of this issue: 349 impact statements on file with the President's Council on Environmental Quality (CEQ) through September 30, 1973 involved airport projects, see 102 Monitor, Environmental Impact Statements, Vol. 3, No. 9, page 178 (Oct. 1973) (Published by the CEQ); in purely monetary terms, projected major airport development costs for the next ten years in the states included within the Ninth Circuit (including Guam) amounts to $997,756,000.00; the nation-wide figure is $4,342,238,000.00. See Federal Aviation Administration, 1972 National Airport Systems Plan (NASP), pp. 30-1.

In this case, however, a private consultant, the Ralph M. Parsons Co., which, as the Ninth Circuit found, Opinion, App. A, p. 13 did and does have a "financial interest in the affirmative decision on the proposed project", (to wit, 15.5% of the total project cost, or nearly $11,000,000), actively participated in the preparation of the EIS. *Ibid.* The court found nothing wrong in this, holding that a "firm with a financial interest in the project may . . . assist with the drafting of the EIS". *Ibid.*

On the other hand, the court stated, at p. 15, that the participation by the FAA in the preparation of the EIS "precludes us from concluding that there was any improper or illegal delegation in this case". This statement is somewhat bewildering, since, as indicated above, Petitioners were precluded by the trial court from developing the relative extent of participation in the preparation of the Reef Runway EIS by the FAA, the State of Hawaii, and Parsons.

In any event, the Ninth Circuit is now in conflict with the law of the Second Circuit as set forth in *Greene County Planning Board v. Federal Power Commission,* 455 F.2d 412, 420 (2nd Cir. 1972), cert. denied, 409 U.S. 849 (1972). *Greene County* held that NEPA prohibits the Federal Power Commission from delegating the task of preparing an EIS to the applicant for a license to construct the very project which is the subject of the EIS, on the grounds that such a procedure creates "the potential, if not the likelihood, that the applicant's statement

will be based upon self-serving assumptions", *Id.* at 420. *Greene County* has been expansively interpreted within the Second Circuit. See *Conservation Society v. Secretary of Transportation*, 362 F.Supp. 627, 629-32 (D.Vt. 1973) (presently on appeal) (*held*, a violation of NEPA for Federal Highways Administration to delegate to the Vermont Department of Highways the task of drafting the EIS for a highway, *even though* the federal agency consulted with the drafters at all stages, commented upon the draft as it progressed, and adopted the final product as its own).

The extent of federal participation required by NEPA in the preparation of an impact statement is an issue of fundamental importance because it effects most agency procedures for the preparation of such statements. The conflict in the circuits therefore results in an intolerable situation: agencies must tailor their NEPA procedures for similar projects in different parts of the country so as to satisfy conflicting demands.

Moreover, apart from the express statutory requirement, strong policy reasons dictate that an EIS be prepared by the "responsible official". An EIS must be as neutral and objective as possible, since its basic purpose is not to justify a decision already made on a proposed project, or even to influence a positive decision thereon, but rather is to provide both the agency and the ultimate-decision makers with an objective survey of the environmental consequences of and the alternatives to the proposed action, with which information an environmentally informed

decision may be made, uninfluenced by strictly monetary interests.[13] Thus the very integrity of the impact statement procedure, and therefore of NEPA itself, is at stake. See generally, Comment, *Delegation of the Drafting of Environmental Impact Statements,* 2 E.L.R. 10153 (1973).

If federal agencies are permitted to entrust preparation of impact statements to self-interested private contractors, the objective look at environmental impacts and alternatives which Congress considered so important is not likely to occur. In this case, for example, the consultant to whom the preparation was entrusted had a substantial interest in additional runway construction, and many alternatives not involving construction were therefore quite naturally not even mentioned in the EIS.

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[13]While it may be permissible for the federal agency to delegate the preparation of the EIS to the state agency involved, see, e.g., *Iowa Citizens v. Volpe*, ... F.Supp., ..., ..., 4 E.R.C. 1755, 1759, 3 E.L.R. 20013, 20015-6 (S.D. Iowa 1972), for the state agency in turn to delegate such task to a private party with an enormous monetary stake in the project surely goes beyond the intent of Congress. For the financial conflict of interest involved herein is to be distinguished from what might be termed a "mission interest" or an "institutional bias" had by federal or state officials who are proposing a project, see *Sierra Club v. Froehlke*, ... F.2d ....., ..., 5 E.R.C. 1920, 1922, 3 E.L.R. 20823, 20825 (7th Cir. Oct. 2, 1973): Parsons stood to lose several million dollars if a decision were made not to proceed with the Reef Runway, whereas the Federal and State protagonists retain their positions and continue to receive their salaries regardless.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,
MICHAEL R. SHERWOOD,
Counsel for Petitioners.

HART, SHERWOOD, LEAVITT,
BLANCHFIELD and HALL,
Of Counsel.

January 8, 1974.

(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 73-1784

Life of the Land; Hawaii Audubon Society; Friends of the Earth; Sierra Club; Raymond Catania; J. Abraham Pasadaba; Wilfred H. Paul, Jr.; and Pete Kaululaau G. Thompson,

Appellants,

vs.

Claude S. Brinegar, Individually and in his capacity as Secretary of the United States Department of Transportation; John Shaffer, Individually and in his capacity as Administrator, FAA National Office; Jack Webb, Individually and in his capacity as Administrator, FAA, Pacific Region; Fujio Matsuda, Individually and in his capacity as Director, Hawaii Department of Transportation,

Appellees,

and

Kalihi-Palama Community Council, James Y. Muraoka, Takeshi Uyesugi, General Contractors Association of Hawaii, a non profit Hawaii Corporation, and Dillingham Corporation, a Hawaii corporation, dba Hawaiian Dredging and Construction Company,

Intervenors-Appellees.

[September 10, 1973]

OPINION

On Appeal from the United States District Court
for the District of Hawaii

Before: HAMLIN and TRASK, Circuit Judges,
and BELLONI, District Judge*

INTRODUCTION

This environmental law case is an appeal from the Final Decision and Order of the United States District Court for the District of Hawaii, holding that appellees have complied with the provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § § 4321 *et seq.*, and the Airport and Airways Development Act of 1970 (AADA), 49 U.S.C. § § 1701, *et seq.*, and denying appellants' prayer for a permanent injunction sought against the Secretary of Transportation and other officials in connection with the construction of the reef runway extension (Reef Runway project) at the Honolulu, Hawaii, International Airport (HIA).

We affirm, concluding that appellees have satisfied the provisions of both NEPA and AADA.

THE PARTIES

Appellants, plaintiffs below, are four environmental organizations[1] purportedly "concerned with the pres-

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*The Honorable Robert C. Belloni, United States District Judge, Portland, Oregon, sitting by designation.

[1]The environmental groups, all non-profit organizations, are Life of the Land, Hawaii Audubon Society, Friends of the Earth, and Sierra Club. The National Audubon Society has submitted an *amicus* brief.

ervation of our natural environment," and four named individual residents of areas affected by flight patterns of aircraft arriving and departing from HIA. Appellants all claim to suffer adverse and irreparable injuries as a result of specific and allegedly illegal acts committed by appellees.[2]

Appellees, defendants below, are the Secretary of Transportation,[3] as the federal official ultimately responsible for federal involvement in the Reef Runway project; two named individual administrators of the Federal Aviation Agency said to have been contributors to the Secretary's alleged malfeasance or nonfeasance; and the director of the Hawaii Department of Transportation, as the state official ultimately responsible for prosecution of the project.

Permitted to intervene as defendants below were the Dillingham Corporation, the contractor which has been awarded the construction contract on the proposed project; two named individuals who reside in areas affected by overflights to HIA, and the Kalihi-Palama Community Council, Honolulu, representing other residents of those areas.

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[2]Appellees below did not question, nor did the district court consider, the propriety of appellants' standing to maintain this action. We are satisfied, however, that appellants are properly before this court. *See United States v. SCRAP*, ... U.S. ..... (June 18, 1973) (slip opinion at 13-19). *Cf. Sierra Club v. Morton*, 405 U.S. 727 (1972); *San Francisco Tomorrow v. Romney*, 472 F.2d 1021, 1023-24 (9 Cir. 1973).

[3]At the time of this suit's initiation in the district court, John A. Volpe was the Secretary of Transportation. He has subsequently been replaced by Claude S. Brinegar.

THE DISTRICT COURT PROCEEDINGS

On November 8, 1972, one day before the scheduled opening of bids for construction of the Reef Runway project, this action for injunctive relief was filed by appellants in the United States District Court for the District of Hawaii. Upon said filing, the district court issued a Temporary Restraining Order.

A hearing on appellants' motion for a preliminary injunction was held from December 13, 1972, to December 22, 1972. On the latter date, the district court denied the prayer for a preliminary injunction and dissolved the Temporary Restraining Order previously entered.

On March 29, 1973, trial was held on the merits, at at which time the evidence of the previous hearing was incorporated as if adduced at that time. Additional testimony was also presented.

On April 13, 1973, the district court filed its Final Order and Decision, denying appellants' prayer for a permanent injunction. The district court also denied appellants' motion for an injunction pending appeal.[4]

After filing a timely notice of appeal, appellants on April 27, 1973, sought an injunction pending appeal to this court. On June 11, 1973, after oral argument, we granted that motion. On August 7, 1973, we heard oral argument on the merits, and the case was submitted for decision.

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[4]In its Final Order and Decision, the district court incorporated by reference the reasoning set forth in its December 22, 1972, Decision and Order. The latter is reported at ..... F.Supp. ..... (D. Haw. 1972).

BACKGROUND OF THE PROPOSED PROJECT

There was evidence before the district court supporting the following statement of facts.

Hawaii is approximately 2,400 miles from the continental United States. Over 99 per cent of all passengers travel to and from Hawaii by aircraft, and the Honolulu International Airport has consequently assumed the status of that state's principal gateway. Further, due to its unique location, HIA is the third largest point of entry for international arrivals in the United States. During labor disputes involving marine transport, HIA takes on special importance, as aircraft become the sole means of shipping and receiving cargo.

HIA serves not only the personal and commercial interests of Hawaii and the nation, but is also vital to the military. With the closing of adjacent Hickam Air Field, the United States Air Force engages in substantial operations at HIA. Of the over 250,000 operations (a landing or take-off) at the airport in fiscal 1971, military operations accounted for 52,221, with 113,701 commercial operations, and 89,992 for general aviation.[5]

HIA is presently operating at capacity levels during peak hours. Forecasts indicate that the number of aircraft operations will increase to 382,000 by 1975, at which time HIA is expected to reach and surpass both hourly and annual capacity levels, and to 493,000 by 1985.

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[5]HIA is 32nd in small craft operations.

Accompanying projected increases in aircraft operations at HIA has been an increasingly disturbing problem of aircraft noise pollution. This noise problem, which first appeared in substantial form with the introduction of jet aircraft around 1960, is accentuated because of the airport's location in close proximity to densely populated residential areas, and to downtown business sections. Further, the prevailing trade winds, which affect aircraft landings and take-offs, complicate the problem.

Increasing operations by jet aircraft have also enhanced the danger of a disaster in the event of a landing or take-off accident. There is evidence that jet aircraft mishaps most often occur within forty seconds after take-off, or about 1.6 miles from the end of the runway. In the case of HIA's present configuration, this would place the aircraft in the midst of the Kalihi-Palama residential neighborhood.

In 1961 or 1962, public concern encouraged investigations of potential solutions, including that of simply moving the jet aircraft seaward, away from human habitation.

In 1962, subsequent to the State Legislature's passage of a resolution reflecting official concern for HIA's noise problem, the state authorized preparation of a report on means to alleviate the problems concomitant with the introduction of jet aircraft at HIA. This early study resulted in the recommendation of the construction of a "Seaward Jet Runway," a proposal which was, however, never implemented because its unfavorable alignment with prevailing winds made it too hazardous to use.

In 1967, consultants were authorized by state officials to prepare a plan for future development of HIA. These consultants recommended the construction of a runway to be located 1,300 feet south and parallel to the existing runway. This plan was in turn submitted to a citizens' Task Force committee, appointed by the Governor of Hawaii. Committee members included responsible local, state and federal officials, and members of the general public. Beginning in February, 1967, and continuing through April, 1970, the Task Force committee met monthly on some 46 or 47 occasions to consider various aspects of the runway construction proposals. These meetings were for the most part open to the public, and publicized in the news media. Included in these discussions were considerations of possible alternatives to, and environmental effects of, the proposed new runway.

The Task Force committee's work culminated in a June, 1968, recommendation that there be constructed what is essentially the project here at issue—a new 12,000 foot long runway on filled reefland, located 6,700 feet south of the existing runway. Such a runway would largely eliminate the spectre of a disastrous aircraft accident in a populated residential area, and would also reduce noise pollution by moving it more than a mile away.

In September, 1968, airline representatives to the Task Force committee commissioned their own study, which concluded that the proposed runway was unnecessary, and that the noise problem could be effectively alleviated with an extension of the existing runway, and the construction of a shorter runway for

inter-island traffic. After review and discussion, the Task Force committee in January, 1970, concluded that the airline proposal provided insufficient benefits to justify a change from the plan of the Reef Runway concept. The final recommendation of the Task Force committee in favor of the Reef Runway was approved by the Governor of Hawaii in February, 1970.

In order to fund the project, the state applied to the Federal Aviation Agency for a matching 50-50 grant pursuant to the Airport and Airways Development Act of 1970, 49 U.S.C. § 1701 *et seq.* In compliance with that statute, a hearing was held on the proposed Reef Runway in Honolulu on March 22, 1971. Life of the Land and the Hawaii Audubon Society, two of the appellants herein, appeared at the hearing, urging consideration of measures to protect a rare water bird endangered by the proposed project.

The Federal Aviation Agency and the State of Hawaii are presently committed to the construction of the Reef Runway. It is to be located in Keehi Lagoon, Manala Bay, south of the existing runway system. The project, whose estimated cost is upwards of $60 million, is scheduled to be completed in two increments by 1975.

There is nothing in the record indicating that the planners of the project believed, or had reason to believe, that the project would have an irreparably deleterious effect upon the environment. On the contrary, the possibility of various environmental side benefits, such as reduction of air and water pollution,

enhancement of recreational boating facilities and improvement in area fishing, see *infra*, were all hopefully anticipated.

THE NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*, became effective on January 1, 1970. The Reef Runway project is conceded by appellees to be a "major federal action, significantly affecting the quality of the human environment," and is therefore subject to compliance with that statute.

NEPA, termed by one court "the broadest and perhaps most important" of recent federal environmental legislation, *Calvert Cliffs' Coordinating Committee, Inc. v. United States AEC*, 449 F.2d 1109, 1111 (D.C. Cir. 1971), "essentially states that every federal agency shall consider ecological factors when dealing with activities which may have an impact on man's environment." *Zabel v. Tabb*, 430 F.2d 199, 211 (5 Cir. 1970). *See generally, Calvert Cliffs', supra*, 449 F.2d at 1111 *et seq.*

To insure that environmental ramifications of proposed projects are properly considered by those responsible for their implementation, section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C)[6] requires that an environmental impact statement (EIS) be prepared to "assess adverse environmental effects and

[6]Section 102(2)(C) of NEPA provides in part:

"Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered

discuss alternatives to the proposed action." *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 786 (D.C. Cir. 1971). As such, the EIS "provides a basis for (a) evaluation of the benefits of the proposed project in light of the environmental risks, and (b) comparison of the net balance for the proposed action with the environmental risks presented by alternative courses of action." *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 833 (D.C. Cir. 1972).

Compliance with NEPA's requirement that an EIS be prepared required the officials involved to essentially duplicate in the form of more formalized studies the accumulated considerations of the preceding several years of investigation and planning, which we have described, *supra*.[7] Preparation of the EIS com-

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in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall——

• • •

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on——

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

• • •"

[7]NEPA does not apply retroactively, but it is applicable to continuing or on-going federal projects commenced prior to January 1, 1970. *Lathen v. Volpe*, 455 F.2d 1111, 1116, 1121 (9 Cir. 1971). The cases are collected in *Citizens Organized to Defend the En-*

menced in December, 1970, and continued until the draft environmental statement was sent out for comments on September 23, 1971. Participating in the writing of the draft EIS were federal and state officials, and employees of the Ralph M. Parsons Company, a private consulting firm. After comments were solicited and received from numerous federal, state and local agencies, private organizations (including three of the appellants), and interested individuals, the team returned to work and prepared the final EIS for official approval and submission to the Council on Environmental Quality (CEQ).

The final EIS, dated January, 1972, was approved by the Federal Aviation Agency's regional director, in connection with his obligation under AADA. On January 21, 1972, the director transmitted the EIS and the comments thereon to the Federal Aviation Agency's Washington, D.C. headquarters, for the approval of the Department of Transportation's Assist-

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vironment, Inc. v. Volpe, 353 F.Supp. 520, 538 (S.D. Ohio 1972) and *Sierra Club v. Froehlke*, 359 F.Supp. 1289, 3 ELR 20248, 20259 (S.D. Tex. February 16, 1973).

NEPA does not contemplate that the decision to proceed with the project be first made by the officials involved, subsequent to which the EIS is prepared as a mere technicality in fulfillment of the statute. Here, however, the federal and state officials involved had contemplated and acquiesced in proceeding with the Reef Runway project before NEPA's passage. The fact that EIS was here prepared after a decision to proceed with the runway project had been made is attributable to the timing of NEPA's effectiveness. We reject the implication made by appellants' counsel at oral argument that the appellees have undermined the thrust of the statute. To the contrary, there is ample evidence in the record indicating that appellees have acted in a good faith attempt to comply with both the spirit and letter of NEPA. *See City of New York v. United States*, 344 F.Supp. 929, 938 (E.D. N.Y. 1972).

ant Secretary for Environment and Urban Systems.[8] The Assistant Secretary approved the EIS on February 29, 1972, and transmitted it to the CEQ on March 1, 1972.

The EIS totals 46 pages, plus appendages. It sets forth four purposes for construction of the Reef Runway project: (1) Reduction of the level of aircraft noise over metropolitan Honolulu, and the Kalihi-Palama area, adjacent to HIA, in particular; (2) improvement in safety by moving operations seaward and away from populated areas in the event of aircraft accidents; (3) increasing airfield capacity to provide for efficient handling of the increasing traffic; and (4) providing an alternative runway during periods when the existing principal runway is under repair.

The major thrust of this appeal is appellants' contention that the preparation, contents and distribution of the EIS failed to comply with NEPA requirements. We will examine the specifics of the EIS in our discussion and disposition of this contention.

Delegation of the EIS' Preparation

Appellants first assert that the preparation of the instant EIS was improperly delegated to a private consulting firm which had a major and direct con-

[8] As reasonably interpreted, NEPA does not require the Secretary of Transportation to *personally* review and approve every EIS submitted to Washington. *Cf. United States v. King*, ___ F.2d ___ (9 Cir. February 28, 1973) (delegation of authority to authorize intereception of oral and wire communications pursuant to 18 U.S.C. § 2516).

tingent financial interest in the Reef Runway's construction.

In June, 1968, the state appellees entered into a contract with Ralph M. Parsons Company (Parsons), a private consulting firm, whereby Parsons agreed to render management consultant services for the engineering, design and construction of the Reef Runway project. According to the contract terms, Parsons was to receive a "Guaranteed Maximum Compensation" which consisted of "15.5% of the Estimated Total Project Cost." The contract defined "project" as "construction, ready for operation by state," of five components, one of which was the Reef Runway.

It does appear from the record that Parsons had a financial interest in an affirmative decision on the proposed project. We find nothing, however, in either the wording of NEPA or the case law, which indicates that, as a matter of law, a firm with a financial interest in the project may not assist with the drafting of the EIS. As the Eight Circuit has indicated, compliance with section 102 of NEPA is based upon good faith objectivity rather than subjective impartiality. *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289, 296 (8 Cir. 1972), *aff'g* 342 F.Supp. 1211 (D. Ark. 1972). *See also Sierra Club v. Froehlke*, 359 F.Supp. 1289, 3 ELR 20248, 20268 (S.D. Tex. February 16, 1973).

Appellees concede that under NEPA, the applicable federal agency must bear the responsibility for the ultimate work product designed to satisfy the requirement of section 102(2) (C). We find no de-

parture from this requirement here. The record indicates that Federal Aviation Agency officials actively participated in all phases of the EIS preparation process. The chief of the Airport Division of the Federal Aviation Agency's Pacific Region testified that he assisted with the preparation from its early stages onward. He stated that, as part of the preparation, regular meetings with other federal officials, State of Hawaii officials, as well as the Parsons representatives, were held. Further, an employee of Parsons testified as to the active involvement of the Federal Aviation Agency in the EIS preparation process. The Parsons employee concluded that the EIS "was more or less a joint effort by Parsons, the State and the F.A.A."

The record further reveals that federal officials in Washington, upon receipt of the EIS, continued active examination thereof.

We agree with the district court's conclusion that "the evidence shows that F.A.A. officials did in fact work together with state officials and a private contractor and gave it close attention." The case law dealing with the delegation of EIS preparation has heretofore been limited to federal agency delegation to a state agency, and has permitted such delegation where the federal agency significantly participated in the preparation of the EIS. *See Citizens for Mass Transit Against Freeways v. Brinegar*, 357 F.Supp. 1269 (D. Ariz. 1973); *National Forest Preservation Group v. Volpe*, 352 F.Supp. 123 (D. Mont. 1972). Unlike *Greene County Planning Board v. F.P.C.*, 455 F.2d 412, 420 (2 Cir.) *cert. denied* 409 U.S. 852 (1972)

and *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation,* ..... F.Supp. ....., ... (D. Vt. July 27, 1973) (opinion at 6), the federal agency here involved did not "abdicate a significant part of its responsibility" to another organization.

While Parsons may have assisted in the EIS' preparation, the significant and active participation by the F.A.A. therein precludes us from concluding that there was any improper or illegal delegation in this case.[9]

Publication and Dissemination of the EIS

Section 102(2) (C) of NEPA, 42 U.S.C. § 4332(C), provides in part:

> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and *shall accompany* the proposal through the existing agency review processes; (emphasis added)

It is uncontested that the comments to the draft statement were not attached to the final EIS and

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[9] *Lathan v. Volpe*, 455 F.2d, *supra*, at 1122, 1126, relied upon by appellants, is not apposite. There, no EIS statement had been prepared.

further, that the FAA failed to include within the EIS the text of all references used in the statement's preparation. Appellants urge that these omissions render the EIS legally insufficient. We disagree.

The federal agency comments: These comments to the draft statement were compiled as a separate document. The comments did, however, follow the proposal through the agency review process, as required by NEPA. *See Monroe County Conservation Society, Inc. v. Volpe,* 472 F.2d 693, 698 (2 Cir. 1972). The record indicates that the comments were submitted to the Assistant Secretary of Transportation for Environmental and Urban Systems. The Comments were subsequently forwarded to the Council on Environmental Quality and the National Technical Information Service, where they became a part of the public record. In *Monroe County, supra,* relied upon by appellants, the court noted that "there is no indication that [the comments] accompanied the statement through the review process." 472 F.2d at 698.

References to the EIS: Appellants also assign error to the fact that the F.A.A. failed to include within the EIS the text of all 22 references used in the statement's preparation.

The record indicates that these references consisted of approximately 2,000 pages of technical material. They were kept on file and made available at the F.A.A.'s regional office in Honolulu. The appellants had ready access to these documents, and did in fact avail themselves of them. The references were also available for forwarding to Washington upon request.

Appellants' insistence that the federal agency comments and technical references *physically* accompany the EIS is an attempt to place form over substance. We have previously rejected such tactics in the NEPA context. *See Jicarrilla Apache Tribe of Indians v. Morton,* 471 F.2d 1275, 1283-85 (9 Cir. 1973). As one court has indicated, "[NEPA] must be construed in the light of reason." *N.R.D.C. v. Morton, supra,* 485 F.2d at 837.

There was no error in either the publication or dissemination of the EIS in this case.

Substantive Content of the EIS

Appellants further contend that the EIS is substantively inadequate, and have submitted voluminous briefs in support of their argument. Appellants' substantive attack on the EIS encompasses assertions that the statement fails to discuss the proposed runway's environmental consequences of increased population and air pollution, fails to discuss "non-construction" alternatives to the project, and inadequately discusses those alternatives which are considered. Further, appellants assert that the EIS discussion of the runway's environmental effects upon noise pollution, water quality, recreation and wildlife is inadequate.

Standard of Review: Agency action under NEPA is subject to judicial review pursuant to § 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *See Environmental Defense Fund v. Corps of Engineers, supra,* 470 F.2d at 298-99, n.14; *Town of Groton v. Laird,* 353 F.Supp. 344, 348 (D. Conn.

1972). As such, a reviewing court may set aside agency action which is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 (1971). *See also Scenic Hudson Preservation Conference v. F.P.C.*, 453 F.2d 463, 467 (2 Cir. 1971), *cert. denied* 407 U.S. 926 (1972). *Cf. Save Our Ten Acres v. Kreger*, 472 F.2d 463, 465-66 (5 Cir. 1973). As we recently stated in *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1281 (9 Cir. 1973):

> "Reversal of a substantive decision is appropriate only to situations where 'the actual costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental factors.'" (citation omitted) *See also, Environmental Defense Fund v. Froehlke*, 473 F.2d 346, 352-53 (8 Cir. 1972); *N.R.D.C., Inc. v. Morton, supra*, 458 F.2d at 838.

We examine appellants' substantive challenges, therefore, mindful of the circumscribed nature of our review.

Demographic Effects: Appellants argue that the EIS is inadequate in that it fails to include a study of the effect of the Reef Runway project upon the population of Honolulu and Hawaii. Appellants contend that a major incentive behind construction of the Reef Runway is Hawaii's need to accommodate and encourage increased tourism to the state. Appellants then posit that the effect of increased tourism will be to increase the *permanent* population of Honolulu, to the detriment of the local "quality of

life." Hence, they argue that the EIS must contain an analysis of the demographic effects of the project.

We reject this reasoning. That an increase in Honolulu's tourism will result in an increase in that city's permanent population is speculative. Certainly, there in no empirical data in the record supportive of the allegation. We agree with the district court's conclusion that "requiring the kinds of demographic discussion suggested by [appellants] is unreasonable in the context of this project."

Hanly v. Mitchell, 460 F.2d 640 (2 Cir.), *cert. denied* 409 U.S. 990 (1972) and *Lathan v. Volpe*, 350 F.Supp. 252 (W.D. Wash. 1972) where EIS discussions of demographic ramifications of the projects in issue were held to be warranted, are factually distinguishable. *Hanly* involved the proposed construction of a prison detention facility in New York City, while *Lathan* involved the proposed construction of a highway through a populated Seattle area. In both cases, the proposed project could reasonably be projected to have an effect upon local population patterns to a degree not evidenced here.[10]

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[10]In *Hanly v. Mitchell*, *supra*, the court noted, 460 F.2d at 642:

"Plaintiffs are all living members of the Chatham Square Civic Community for a Planned Community, a non-profit group concerned with the development and protection of that portion of lower Manhattan called the Civic Center. Although the area contains many government buildings, including several courthouses, surprisingly at least 50,000 people live there and in adjacent Chinatown. Included in that group are over 3,000 persons living in approximately 660 cooperative apartment buildings called Chatham Towers and Chatham Green. These face the proposed new jail, some 100-150 feet away."

In *Lathan v. Volpe*, *supra*, the proposed highway was described as follows, 350 F.Supp. at 263:

Air Pollution: It is agreed by all parties that no studies were made of the effect of the Reef Runway project upon air pollution. The failure to conduct such a study, however, was not an inadvertent omission. Rather, a threshold decision was made by federal and state officials that air pollution studies were unnecessary in this specific case because of the very nature and location of the proposed project.

The Reef Runway will relocate aircraft take-offs, the major source of aircraft air pollution, 6,700 feet seaward, and away from the populated areas of Honolulu. The essence of this project, therefore, involves moving the sources of the air pollution away from people. The federal and state officials concluded that detailed air pollution studies were unnecessary, on the premise that at the very least, the project was extremely unlikely to worsen the air quality in any relevant sense.

Further, appellants do not claim that the project will deteriorate the existing air quality; rather, they

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"The proposed segment involved herein would create a ten-lane highway along the alignment of an existing four-lane highway. It would cross Lake Washington from the east on a floating bridge, enter Seattle by a tunnel through the Mount Baker district, emerge and continue through a heavily populated area, and join I-5, a north-south interstate highway." See also *Lathan v. Volpe*, *supra*, 455 F.2d 1114, where we noted that this highway ran "through a densely populated, low income, city area; * * *."

Similarly distinguishable is *Sierra Club v. Froehlke*, *supra*, 3 ELR at 20271-20272, where the court observed that "there is reason to believe that there will be development, growth and industrial expansion as a result" of the project there in issue. As we note in the text, appellants' contention that the Reef Runway project will result in expansion of the permanent population of Honolulu is mere speculation, unsupported by the record.

urge that a detailed study may conceivably reveal that anticipated environmental improvement may be less than expected.

The district court acknowledged that the EIS may well have set forth in more detail the reasoning leading to the conclusion that there were no significant air pollution problems inherent in the project. But, on the record as a whole, we are unable to conclude that the district court erred in rejecting appellants' air pollution arguments.

Alternatives: Section 102(2)(C) (iii) of NEPA, 42 U.S.C. § 4332(2)(C) (iii), requires that the EIS include a discussion of "alternatives to the proposed action." *See* CEQ Guideline, § 62 (iv), 36 Fed. Reg. 7725 (1971). Appellants contend that the EIS here "fails completely to discuss some reasonable and feasible alternatives to the proposed action," and "treats other alternatives in insufficient detail."

The EIS contains a brief discussion of four alternatives to the proposed construction of the Reef Runway extension. Three involve various runway concepts and configurations, and the fourth, the alternative of taking no action.

In support of their allegation that the alternatives which were considered were insufficiently treated, appellants introduced at trial testimony calculated to discredit certain data considered in rejecting only one alternative—that of extending the existing runway back into adjoining Hickam Air Field.[11] The planners,

[11]The other construction alternatives considered were construction of the "Seaward Jet Runway," and construction of a close-in

in addition to concluding that this alternative would create more noise than it would alleviate, noted that the replacement cost to the military would be $37 million. At trial, appellants introduced evidence indicating that this figure was inflated. No other evidence on the subject of alleged insufficiently treated alternatives was offered. There is, for instance, no allegation that an important consideration in connection with a given alternative was ignored. We find no error in the EIS' discussion of alternatives.

In addition to challenging the disposition in the EIS of alternatives which were in fact considered, appellants further contend that there exist alternatives not considered which could well accomplish the objectives of the Reef Runway project. These alleged alternatives are identified by appellants as "non-construction alternatives," which they defined as "those arrangements for managing airports as to questions like noise and capacity and air pollution which do not involve the building of new structures."

For instance, appellants suggest removal of the Air Force's KC-135 jet tankers, the loudest of the aircraft operating from HIA, to an adjacent airfield. There is, however, evidence indicating that the Air Force had refused to move its jet tankers to another base, effectively eliminating implementation of this alter-

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parallel runway. Both were rejected because of inability to alleviate the noise and safety problems.

The alternative of taking no action was rejected because, without the proposed project, high noise levels would continue unhampered, and the problems of safety would remain unsolved. Further, the failure to provide for the expected growth in airport traffic would result in increasing delays.

native. Further, removal of the jet tankers would obviously do little to alleviate the significant noise pollution and safety problems attributable to commercial aviation.

Another alternative urged by appellants is the imposition of higher landing fees at HIA, in the hope of reducing commercial aircraft traffic. This alternative was considered early in the planning process, but rejected as ineffectual inasmuch as attempts at other airports to reduce traffic by such means have proven unsuccessful.

Appellants further suggest that private aircraft be transferred to another airfield. Again, however, such a transfer would have no effect upon the noise and safety problems presented by larger aircraft. It further appears that a ban on general aviation would violate legal agreements entered into by HIA, guaranteeing the airport's accessibility to all users.

Appellants also urge that the inter-island aircraft operating out of HIA could be required to commence their take-offs at a different point on the present runway configuration, thereby eliminating the noise problem. The record, however, indicates that only a minor percentage of the aircraft operating at HIA would be affected by this alternative, and it would therefore have only a token effect on the over-all situation.

Finally, there is nothing in the record to indicate that alternatives such as the readoption of airline schedules, imposition of curfew restrictions,[12] or con-

[12] At any rate, the state is apparently without constitutional authority to impose aircraft curfew restrictions. *City of Burbank v. Lockheed Air Terminal*, ... U.S. ..... (May 14, 1973).

version to wide-body aircraft design are either reasonable or feasible alternatives in this case.[13]

NEPA's "alternatives" discussion is subject to a construction of reasonableness. *N.R.D.C., Inc. v. Morton, supra,* 458 F.2d at 834. Certainly, the statute should not be employed as a crutch for chronic fault-finding. Accordingly, there is no need for an EIS to consider an alternative whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative. *Id.* at 834. Rather, the EIS need only set forth those alternatives "sufficient to permit a reasoned choice." *Id.* at 836. This has been done. *See also Committee for Nuclear Responsibility, Inc. v. Seaborg, supra,* 463 F.2d at 787; *Pennsylvania Environmental Council v. Bartlett,* 315 F.Supp. 238, 250 (M.D. Pa. 1970).

Appellants also challenge the adequacy of the EIS' discussion of the Reef Runway's impact upon the human and natural environment. They challenge statements as unsupportable, contradictory and factually erroneous. We examine these contentions, again mindful of the limited scope of our review, *supra.*

Noise Pollution: Appellants do not assert that the project will have an adverse effect upon the environment by increasing noise pollution. Indeed, a prime reason for the Reef Runway project is to reduce the level of jet noise in the areas adjacent to HIA.

The EIS does discuss and graph the noise situation in some detail. There is substantial evidence in the

[13] We reject appellants' implication that various techniques utilized at other airports in the continental United States are necessarily adaptable to the unique situation existing at HIA.

record, including testimony by responsible federal officials, supporting the EIS' conclusion that the project will result in significant reduction of noise pollution.

Appellants' prime objection to the EIS' treatment of noise pollution is the omission therein of "on-site" noise measurement techniques. In lieu thereof, the F.A.A. utilized another well-recognized scientific technique, which rendered "on-site" measurement unnecessary. The record indicates that "on-site" measurements of independent organizations were in fact considered by the planners.

Undoubtedly, there exists a plethora of scientific studies which could have been, but were not, used to measure the noise pollution levels in the area involved. We cannot, however, conclude that the district court made a "clear error in judgment," *Citizens to Preserve Overton Park, supra,* 401 U.S. at 416, in concluding that "(t)he kinds of studies suggested by [appellants] may be useful but are hardly necessary."

Water Quality: The EIS, utilizing four scientific studies undertaken for the project, concluded that the project would result in an improvement of the water quality in the marine area adjacent to the Reef Runway.

At trial, appellant presented scientific studies and various letters from university professors purportedly contradicting the EIS' water quality conclusions.

One scientist testified that one of the studies referred to in the EIS, a report of a hydraulic study prepared under the auspices of the University of Hawaii, might be read as indicating a different con-

clusion from that given in the EIS. The record indicates, however, that this study was based upon a proposed configuration of the project which was subsequently changed. An analysis of the project based upon this new configuration was supportive of the hydraulic study.

Appellant also introduced letters at trial after testimony was terminated, which questioned certain data and conclusions relied upon in the preparation of the EIS' water quality analysis. Apart from the obvious observation that the letter writers were, for the most part, not available for cross-examination, we note that disagreement among experts will not serve to invalidate an EIS. Indeed, "(f)urther studies, evaluation and analyses by experts are almost certain to reveal inadequacies or deficiencies." *Environmental Defense Fund v. Corps of Engineers*, 342 F.Supp. 1211, 1217 (E.D. Ark. 1971), *aff'd* 472 F.2d 289 (8 Cir. 1972). The purpose of the EIS is to inform the decision makers of the environmental ramifications of the proposed action. *See Committee for Nuclear Responsibility v. Seaborg, supra*, 463 F.2d at 787. The statement need not achieve scientific unanimity on the desirability of proceeding with the proposed action.

Recreation: The EIS anticipates an enhancement of recreational boating facilities and an improvement in fishing conditions as a result of improvement in the water quality of Keehi Lagoon, *supra*, and the construction of channels to the open sea.

Appellants contend, however, that construction of the Reef Runway will result in "loss of surfing sites"

and "loss of the effective use of the proposed Sand Island Park due to high aircraft noise."

In support of the first allegation, appellants introduced at trial the tetimony of the founder of a local surfing club, who was described as an "out-reach" worker with disadvantaged youths. The witness testified that the youths feared the project might result in adverse surfing conditions. This was the sole evidence produced at trial supportive of the "loss of surfing site" arguments. The district court was understandably unpersuaded by this hearsay testimony.

The contention that use of a proposed nearby park will be adversely affected as a result of noise from aircraft utlizing the Reef Runway was adequately considered in the EIS.

On the record as a whole, we are unable to upset the district court's conclusion that the EIS adequately deals with the recreational aspects of the Reef Runway project.

Wildlife: The EIS acknowledges that the proposed project will have an adverse environmental effect upon certain wildlife. This is the only clearly documented adverse environmental effect of the project which could be said to be significant. The statement notes that the Reef Runway project will displace some 186 acres of silted coral mudflats used for feeding and roosting by birds, including the rare Hawaiian Stilt. Up to 100 of these endangered birds may be affected. Appellants' concern for the Hawaiian Stilt is the basis of their attack upon this aspect of the EIS.

The record indicates that the plight of the Stilts has continuously been a matter of concern to the planners of the project. As recommended by appellants, the replacement habitats at nearby Pearl Harbor Naval Station are being developed in conjunction with the project. Also included in the project itself is the construction of certain ponds and islets suitable for the birds at a cost in excess of $350,000. *Cf. Sierra Club v. Froehlke, supra*, 3 ELR at 20272.

The main contention of appellants here is that the size of the replacement habitats may prove to be inadequate. But the district court noted, and we concur, that if the size of the habitats do indeed prove to be inadequate, there is no reason why adjustments could not be made even if the construction as planned proceeds to completion.

The record indicates that the project's planners were concerned with, and took adequate steps to minimize, the harm presented to the birds. The discussion in the EIS of the project's environmental ramifications upon wildlife was adequate.

It is our conclusion that the EIS here in issue adequately complies with NEPA requirements.[14]

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[14] Appellants, noting that the EIS must stand or fall on its own merits, also contend that the district court impermissibly permitted the Federal Aviation Agency to "bolster" the document with "extrinsic evidence."

The record indicates otherwise. The "extrinsic evidence" was testimony showing why certain matters were not contained in the EIS, and was presented after appellants had challenged such deficiencies. The testimony was by "the administrative officials who participated in the decision * * * explaining their action." *Citizens to Preserve Overton Park v. Volpe, supra*, 401 U.S. at 420. There was no error.

AIRPORT AND AIRWAYS DEVELOPMENT ACT OF 1970

In addition to their NEPA contentions, appellants assert that appellees have failed to comply with the requirements of section 16(c)(4) of the Airport and Airways Development Act of 1970, 49 U.S.C. § 1716 (c)(4). We find this contention equally without merit.

Section 16(c)(4) of AADA requires, in pertinent part, that the Secretary of Transportation

> shall authorize no [airport extension] project found to have adverse effect unless (he) shall render a finding, in writing, following a full and complete review, which shall be a matter of public record, that no feasible and prudent alternative exists and that all possible steps have been taken to minimize such adverse effect.

The record indicates that the required finding was made as a product of lengthy review by federal officials. The finding is supported by the EIS which, one court has held, may itself be considered as a section 16(c)(4) finding. *Citizens Airport Commission of Chesterfield County v. Volpe*, 351 F.Supp. 52, 59 (E.D. Va. 1972).

There are virtually no cases indicating the standard of review a court must employ when analyzing compliance with section 16(c)(4). In *Citizens to Preserve Overton Park v. Volpe*, *supra*, however, the Supreme Court construed section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f), which contains virtually the identical relevant lan-

guage of AADA.[15] The Supreme Court there stated that "the reviewing court must be able to find that the Secretary could have *reasonably believed* that in this case there are no feasible alternatives or that alternatives do involve unique problems." 401 U.S. at 416 (emphasis added). The Court further noted that, pursuant to section 702(2)(A) of the Administrative Procedure Act, the Secretary's action must not have been arbitrary or capricious. *Id.*

Incorporating the discussion of the adequacy of the EIS in our analysis of appellees' compliance with NEPA, we conclude that under the applicable standards of review, appellees have complied with AADA.

CONCLUSION

For the reasons stated herein, the injunction pending appeal is hereby dissolved effective immediately, and the judgment of the district court is

AFFIRMED.

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[15]Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f), mandates that the Secretary of Transportation disapprove any project which requires the use of parklands unless "(1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area [etc.] * * *."

The relevant language in section 16(c)(4) of AADA reads "no feasible and prudent alternative exists," and "all possible steps have been taken to minimize" harm to the environment.

Appendix B

In the United States Court of Appeals
For the Ninth Circuit

No. 73-1784

Life of the Land, et al., Appellants,
v.
Claude S. Brinegar, et al., Appellees,
and
Dillingham Corporation, etc., Intervenor/Appellee.

[Filed Oct. 16, 1973]

ORDER

Before: HAMLIN and TRASK, Circuit Judges, and BELLONI, District Judge*

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

*Honorable Robert C. Belloni, United States District Judge, Portland, Oregon, sitting by designation.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The panel has also voted to deny the motion to stay the dissolution of the injunction, and further, to deny the alternative motion for reinstatement of the injunction pending appeal.

Dated: October 15, 1973.

O. D. Hamlin,
United States Circuit Judge.

Appendix C

363 F.Supp. 1171 (1972)

United States District Court,
D. Hawaii.

Civ. No. 72-3683

Life of the Land et al., Plaintiffs,

v.

John Volpe, Individually and in his capacity as Secretary of the United States Department of Transportation, et al., Defendants,

and

Kalihi-Palama Community Council et al., Defendants-Intervenors.

Dec. 22, 1972.

DECISION AND ORDER

SAMUEL P. KING, District Judge.

This case involves the administrative steps taken in authorizing the Reef Runway Project at Honolulu International Airport.[1]

[1] "The proposed action involves Federal financial assistance pursuant to the Airport and Airway Development Act of 1970 to construct a new runway at Honolulu International Airport, Honolulu, Hawaii. The construction of this runway, generally referred to as the 'Reef Runway', consists of filling, grading and paving an airplane runway 12,000 feet long, 200 feet wide with a 1,000-foot long runway safety area on each end and 250-foot wide shoulders. The runway, to be located approximately 6,700 feet seaward of existing Runway 8-26, will include a protective structure 1,050 feet seaward of and parallel to the new runway to prevent storm wave damage." EIS page i.

The pending issue requires a decision as to whether a preliminary injunction shall be granted prohibiting further implementation of the project. A temporary restraining order was signed by Judge Pence just before the opening of bids for the construction of the runway. That order resulted in a suspension of the bidding process and is still in effect.

Plaintiffs are four organizations concerned with our natural environment and four individuals living in an area affected by this airport's operations. Defendants are the federal and state officials concerned with the project. Intervenors, as defendants, are the contractors who submitted bids for the construction of the runway, the General Contractors Association of Hawaii, two residents of Kalihi-Palama, and the Kalihi-Palama Community Council representing other residents of the affected area.

The operative statutes are the National Environmental Policy Act (NEPA), especially § 102(2)(C),[2] and the Airport and Airway Development Act (ADAP), especially § 16.[3]

The defendants appear to have complied with the requirements of these statutes.

NEPA demands that all agencies of the Federal Government

> "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

[2] 42 U.S.C. § 4332(2)(C).

[3] 49 U.S.C. § 1716.

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."[4]

A detailed statement called a Final Environmental Impact Statement (EIS) was prepared. It purports to discuss the required matters.

ADAP demands that the Secretary of Transportation shall consult with the Secretaries of the Interior and Health, Education and Welfare, regarding environmental effects, and shall not authorize an airport project

> "found to have adverse effect unless the Secretary shall render a finding, in writing, following a full and complete review, which shall be a matter of public record, that no feasible and pru-

[4]Portion of 42 U.S.C. § 4332(2)(C). There are other provisions of 42 U.S.C. § 4332 which are pertinent and have been considered. For example, plaintiffs pointed to the requirement that copies of the EIS and of the comments and views of the appropriate federal, state, and local agencies "shall accompany the proposal through the existing agency review process" and argued that this was not done. The evidence showed that this was done.

dent alternative exists and that all possible steps have been taken to minimize such adverse effect."[5]

The Secretary of Transportation obtained comments from the other two referenced departments and made the necessary finding.

[1] Case law makes it clear, nevertheless, that a NEPA statement may be inadequate even though it contains material covering the statutory subjects of inquiry, and that the administrative process may be improper even though it includes the use of such a statement.[6]

So it is necessary to consider the several questions raised by plaintiffs as to the adequacy of the EIS as measured by the standards developed by these cases.[7]

In doing so, I consider the statements in the EIS to be augmented by the attachments thereto and the references listed therein.[8] I also make distinctions

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[5]Portion of 49 U.S.C. § 1716(c)(4). Other requirements of ADAP are mentioned below.

[6]Administrative Procedure Act, 5 U.S.C. § 706(2); Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission, 146 U.S.App.D.C. 33, 449 F.2d 1109 (1971); Lathan v. Volpe, 350 F.Supp. 262 (W.D. Wash. 1972); Brooks v. Volpe, 350 F.Supp. 269 (W.D. Wash. 1972).

[7]Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); Environmental Defense Fund, Inc. v. United States Army Corps of Engineers, 470 F.2d 289 (8th Cir. 1972).

[8]There are 24 documents, including the required comments by concerned federal agencies, among the references to the EIS. Many of these references ran well over 100 pages in length. The references were made available to interested mmbers of the public including plaintiffs, along with the EIS itself, before the public hearings which were held in connection with the project.

among these cases based upon the character of the project.[9]

I have made these measurements. I find that the discussion set forth in the EIS complies with the requirements of NEPA, or that in those instances where additional discussion or disclosure should be set forth in the EIS the only delinquency is in draftsmanship and not in any failure to consider the deleted matter as if it had been set forth in full in the EIS, or that the question raised by plaintiffs is one to which the EIS need not address itself.[10] Without attempting an exhaustive discussion of each of the matters as to which plaintiffs argue that the EIS is deficient, I shall illustrate the three categories mentioned.

Plaintiffs question the treatment in the EIS of the problem of noise pollution. But the EIS does discuss and graph the noise situation in some detail. The kinds of studies suggested by plaintiffs may be useful

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[9]For example, an adequate EIS in connection with the establishment of a new airport might well differ quantitatively and qualitatively from an adequate EIS in connection with the expansion of an existing airport.

"On March 22, 1971, a public hearing was held . . . At the hearing, the State of Hawaii . . . presented evidence that the Reef Runway would:

. Reduce noise over Honolulu
. Reduce overflights over Honolulu
. Increase airfield capacity
. Provide an alternate runway during periods when the existing principal runway is under repair"

EIS page 8.

[10]See Committee for Nuclear Responsibility v. Seaborg, 3 ERC 1126 (D.C.Cir. October 5, 1971); Conservation Council v. Froehlke, 340 F.Supp. 222 (M.D.N.C. 1972), aff'd 4 ERC 1044 (4th Cir. May 2, 1972); Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275 (9 Cir. 1973).

but are hardly necessary. They suggest a degree of certainty to which the situation does not lend itself.

Plaintiffs question the treatment in the EIS of air pollution. But building the runway does not permit air pollution beyond limits set by other laws which control air quality. The EIS does treat of the visual aspects of air pollution, and the evidence adduced indicates that nobody considered other aspects of air pollution to be an important problem until this action was filed, and that the government agencies charged with policing air quality felt that there would be no significant problem in this area. Perhaps the EIS should set forth in more detail the reasoning leading to this conclusion. But it cannot be said that air pollution was not considered by the decision makers.

[2, 3] Plaintiffs question the omission from the EIS of any discussion of the demographic impact of the traffic facilitated by the runway. Undoubtedly an EIS should discuss all of the significant primary environmental effects, and all of the substantial secondary environmental effects, of a project. How far beyond these effects an EIS should go may still be an open question, but there must be some limit. A "rule of reason" was suggested in argument.[11] In my opinion, requiring the kinds of demographic discussion suggested by plaintiffs is unreasonable in the context of this project.

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[11]See Natural Resources Defense Council, Inc. v. Morton, 148 U.S.App.D.C. 5, 458 F.2d 827 (1972); Committee for Nuclear Responsibility v. Seaborg, *supra* n. 10; EDF v. United States Army Corps of Engineers, *supra* n. 7.

The discussion in the EIS of alternatives needs separate consideration. Case law places special emphasis on this NEPA requirement and especially on the inclusion of abandonment of the project as an alternative.[12] The EIS here is very sketchy in this area. Yet it does appear from the evidence that the responsible officials in the decision making process and in the review processes did in fact consider many alternatives, including nonconstruction alternatives. I am persuaded that Mr. Thompson is right when he argues that a detailed discussion of national programs to reduce noise pollution and to improve operational efficiency should not have to be repeated in every EIS for every airport project. On the other hand, these statements are designed as much to alert and inform the public as to perform the function of the devil's advocate for the decision makers.[13] What is obvious and platitudinous to those who live with a program daily for several years is new and fearful to one who is confronted with the same program for the first time. While the EIS here may be minimally in technical compliance with statutory requirements, it leaves much to be desired as an example of the art of communication.

Mention should be made here of the extensive consideration of this project over a period of some 10

[12]Natural Resources Defense Council, Inc. v. Morton, *supra* n. 11.

[13]The cases emphasize the functions of the EIS in (1) providing evidence that the decision-making process required by NEPA was in fact followed, and (2) giving the decision makers who are removed from the initial proposal sufficient data from which to make their own determination of costs and benefits. See Brooks v. Volpe, *supra* n. 6.

years. Planning did not begin with NEPA, and while some of the present vocabulary is new, the concerns to which planners addressed themselves are not. A special task force on the airport development, involving responsible local, state and federal officials and members of the public, met about once a month for some 4 years, and wound up recommending the reef runway. The secretary of that committee testified to the many matters discussed. Because of the input from this committee's members and from other sources, the original plan was in fact materially altered, as, for example, by the change from a straight sea wall to an S-curve sea wall.

Again, it should be noted that many of the effects feared by plaintiffs can be alleviated or prevented, if they eventuate, even if construction as planned proceeds to completion.

Other questions were raised with respect to compliance with NEPA and ADAP requirements.

[4] I ruled previously that NEPA does not prevent the employment of a private contractor who has a financial stake in the project to draft an EIS. NEPA does require that the final EIS be sufficiently reviewed and considered by the "responsible official" to insure that it was a part of the decision making process.[14] Here the evidence shows that FAA officials did in fact work together with state officials and a

[14]EDF v. U. S. Army Corps of Engineers, *supra* n. 7; Greene County Planning Board v. Federal Power Com'n, 455 F.2d 412 (2d Cir. 1972); Upper Pecos Association v. Stans, 452 F.2d 1233 (10th Cir. 1971).

private contractor in the preparation of the EIS and gave it close attention.[15]

The absence of a national airport development system plan is proposed as a basis for prohibiting this development.[16] The evidence is that there is such a plan although it has not yet been published.

The certificate of the governor[17] and the finding of the Secretary of Transportation[18] are said to be unsupported. Assuming without deciding that these executive actions are subject to judicial review, there is ample support in the record for the proposition that they are deliberate conclusions based upon ample information.

[5] Under all of the circumstances and upon the evidence adduced it is my opinion that it is improbable that plaintiffs will prevail upon the merits of their complaint. Therefore, a preliminary injunction

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[15]Plaintiffs assert that the "comments and views of the appropriate Federal, State, and local agencies" did not "accompany the proposal through the existing agency review processes" as required by 42 U.S.C. § 4332(2)(C). The short answer to this assertion is that they did.

[16]49 U.S.C. § 1716(a): ". . . No project application shall propose airport development other than that included in the then current revision of the national airport system plan formulated by the Secretary under this subchapter . . ."

[17]49 U.S.C. § 1716(e)(1): "The Secretary shall not approve any project application for a project involving airport location, a major runway extension, or runway location unless the Governor of the State in which such project may be located certifies in writing to the Secretary that there is reasonable assurance that the project will be located, designed, constructed, and operated so as to comply with applicable air and water quality standards. . . ."

[18]49 U.S.C. § 1716(e)(4). See quote referenced to n. 3 *supra*.

will be denied.[19] The temporary restraining order is lifted.

[6] I will entertain requests for additional findings of fact and conclusions of law.[20]

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[19]The matter came on before me for hearing on a permanent injunction on March 29, 1973. No further substantial evidence was adduced, and the matter was submitted on the record made at the hearing on a preliminary injunction with some additional offerings. I reaffirmed my earlier decision, denied a permanent injunction, and denied the request for a stay pending appeal. (There were some changes in parties between December 22, 1972, and March 29, 1973. Following the December 22, 1972, decision, bids were opened, and a contract was awarded. The unsuccessful bidders withdrew as defendants-intervenors herein. There was earlier a passing suggestion that there might be a standing issue, but inasmuch as at least one plaintiff had standing the issue was not pursued. I was prepared to hold that all plaintiffs had standing. Plaintiffs had sought to prevent intervention by the defendants-intervenors, but I earlier ruled against them and allowed the intervention.)

[20]Defendants-intervenors sought to avoid plaintiffs' challenge by charging them with laches, citing Clark v. Volpe, 342 F.Supp. 1324 (E.D.La.1972), aff'd 461 F.2d 1266 (5th Cir. 1972). The appellate court cited Ragland v. Mueller, 460 F.2d 1196 (5th Cir. 1972), which held that it was unreasonable to apply NEPA retroactively to a road project when 16 of 20 miles had already been fully completed and the right-of-way for the remaining 4 miles had already been acquired. I ruled previously that plaintiffs were not barred by laches. There was no showing that plaintiffs' timing constituted unreasonable delay. Rather, the evidence showed that plaintiffs used the period between approval of the EIS on February 29, 1972, and the filing of this action on November 8, 1972, to pursue available administrative remedies. The court may even decline to invoked laches in environmental cases "because of the public interest status accorded ecology preservation by the Congress." Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323, 1329 (4th Cir. 1972). See Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F.Supp. 238, 246 (M.D.Pa.1970), aff'd 454 F.2d 613 (3rd Cir. 1971); Harrisburg Coalition Against Ruining the Environment v. Volpe, 330 F.Supp. 918, 924 (M.D.Pa.1971); Nolop v. Volpe, 333 F.Supp. 1364 (D.S.D. 1971); Natural Resources Defense Council v. Grant, 341 F.Supp. 356 (E.D.N.C. 1972).

Appendix D

In the United States District Court
for the District of Hawaii

Civil No. 72-3683

Life of the Land et al., Plaintiffs,

vs.

John Volpe, Individually and in his capacity as Secretary of the United States Department of Transportation, et al., Defendants,

and

Kalihi-Palama Community Council et al., Defendants-Intervenors.

FINAL DECISION AND ORDER

This matter having come on regularly for hearing on the merits on March 29, 1973, and the Court being fully advised in the premises, now therefore, for the reasons set forth in this Court's Decision and Order herein dated December 22, 1972,

It Is Hereby Ordered that the request of the plaintiffs for a permanent injunction be and the same hereby is, DENIED.

It Is Further Ordered that the plaintiffs' request for an injunction pending appeal, made pursuant to Rule 62(c), Federal Rules of Civil Procedure, and

Rule 8(a), Federal Rules of Appellate Procedure, be, and the same hereby is, DENIED.

Dated: This 12th day of April 1973 at Honolulu, Hawaii.

Samuel P. King,
Judge of the above-entitled
Court.

Appendix E

STATUTORY PROVISIONS INVOLVED

A. National Environmental Policy Act of 1969:

United States Code, Title 42:

§ **4321. Purpose.**—The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

§ 4331. Congressional declaration of policy.—(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

. . .

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; . . .

§ **4332. Administration consistent with policies of Act.**—The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

. . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

. . .

B. Airport and Airways Development Act of 1970:

United States Code, Title 49:

§ **1716. Submission and approval of projects for airport development.—(a) Submission.**— . . . [A]ny public agency, or two or more public agencies acting jointly, may submit to the Secretary a project application, in a form and containing such information, as the Secretary may prescribe, setting forth the airport development proposed to be undertaken. . . .

. . .

(c) Approval.—(1) All airport development projects shall be subject to the approval of the Secretary, . . .

. . .

(4) It is declared to be national policy that airport development projects authorized pursuant to this part shall provide for the protection and enhancement of the natural resources and the quality of environment of the Nation. In implementing this policy, the Secretary shall consult with the Secretaries of the Interior and Health, Education, and Welfare with regard to the effect that any project involving airport location, a major runway extension, or runway location may have on natural resources including, but not limited to, fish and wildlife, natural, scenic, and recreation assets, water and air quality, and other factors affecting the environment, and shall authorize no such project found to have adverse effect unless the Secretary shall render a finding, in writing, following a full and complete review, which shall be a matter of public record, that no feasible and prudent alternative exists and that all possible steps have been taken to minimize such adverse effect.

. . .